

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN JONATHAN DALY,

Defendant-Appellant.

UNPUBLISHED
February 12, 2004

No. 243958
Oakland Circuit Court
LC No. 2002-183798-FC

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of attempted armed robbery, MCL 750.92, and conspiracy to commit armed robbery, MCL 750.157a. We affirm.

Defendant first argues that he was entitled to a separate trial from the codefendants. We disagree. Because the claim of error is unpreserved, defendant must establish plain error that affected his substantial rights to avoid forfeiture. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). If he succeeds, this Court will only reverse the trial court decision when the defendant is actually innocent or when the error “‘seriously affect(ed) the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant fails to establish plain error because he was not entitled to a separate trial. In *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994), our Supreme Court held that “‘inconsistency of defenses is not enough to mandate severance; rather, the defenses must be ‘mutually exclusive’ or ‘irreconcilable.’” Here, the trial court found no evidence of mutually exclusive, or even inconsistent, defenses. Moreover, the only inconsistency present was between defendant’s testimony at trial and his earlier statement to police. We therefore reject this argument.

Next, defendant argues that the trial court’s decision to admit the statements of his codefendants at trial violated his rights under the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20. We disagree. Again, defendant did not preserve this claim of error, thus, he must establish plain error affecting his substantial rights to avoid forfeiture. *Carines, supra*.

We find no error here. The trial court admitted the statements under MRE 804(b)(3) using our Supreme Court’s analysis in *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993).

The court concluded that each statement was voluntary and non-exculpatory, and that there was no evidence the declarants lied. Defendant barely acknowledges this analysis and fails to argue why it was wrong. We therefore conclude that defendant fails to establish plain error under *Carines*, and we reject this argument.

Defendant also argues that he received ineffective assistance of counsel at trial. We disagree. Defendant did not seek an evidentiary hearing and does not challenge findings of fact, so our analysis is limited to mistakes apparent on the record. See *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996).

Defendant asserts that his trial counsel was ineffective for failing to object to the admission of the codefendants' statements and for failing to move for a separate trial. But these would have been fruitless actions because the trial court considered and rejected both actions on a codefendant's motion. The law does not require an attorney to take futile actions, and it would have been futile for trial counsel to renew failed motions. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant also asserts that counsel was ineffective for questioning defendant regarding a prior uttering and publishing conviction. The prosecutor could have introduced this conviction during cross-examination, MRE 609(1)(1), and "it may be sound trial strategy for a defendant to front a conviction that is likely to come to the jury's attention on cross-examination." *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). Accordingly, we reject this argument.

Finally, defendant argues that his conspiracy conviction must be vacated because the verdicts were inconsistent. We disagree. Logically inconsistent verdicts are not a ground for reversal. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Here, the jury convicted the man who served as the "lookout" of conspiracy to commit unarmed robbery and convicted defendant and another man of conspiracy to commit armed robbery. The jury could have found that all three men agreed to unarmed robbery, and that defendant agreed with the other man to use a weapon after they had left the lookout for the crime scene. So the verdicts were not logically inconsistent, and even if they were, there would be no error. We therefore reject this argument.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra